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U.S. DISTRICT COURT
N.D. OF ALABAMA

Exhibit 6

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE NORTHERN DISTRICT OF ALABAMA
3 SOUTHERN DIVISION
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5 IN RE: BLUE CROSS BLUE SHIELD
6 Master File No. 2:13-CV-20000-RDP
7 ANTITRUST LITIGATION
8 MDL NO. 2406
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11 VIDEO DEPOSITION OF DANIEL RUBINFELD, PH.D.
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16 September 1, 2017
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22 Certified Realtime Reporter,
23 Registered Professional
24 Reporter and Notary Public
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1 that -- refer you to a prior answer I gave this
2 morning, which is that I have not done a but for
3 analysis of exactly what the world would be like if
4 the exclusivity part of the -- exclusivity
5 restraint were eliminated.

6 Q. (BY MR. LAYTIN:) And you haven't
7 studied whether a primary service area model is
8 consistent with plans' local common law trademark
9 rights, correct?

10 MR. BROWN: Object to the form.

11 A. I have no opinion about the
12 development and changes in common law rights and
13 all of that. I don't have any opinion about that.

14 Q. (BY MR. LAYTIN:) Understood. How do
15 local best efforts restrict Blue-on-Blue
16 competition?

17 A. Are you referring to a particular
18 part in my report or --

19 Q. Paragraph 47 may be instructive for
20 you.

21 A. Thank you.

22 Q. It may not. I don't guarantee it.

23 A. Noted. So could you repeat your
24 question again?

25 Q. How do local best efforts rules

1 restrict Blue-on-Blue competition?

2 A. I don't see the -- I don't see the
3 local best efforts restriction as focusing on
4 Blue-on-Blue competition. I see that as more the
5 exclusivity restriction and, to some extent, the
6 national best efforts clause but less -- but not so
7 much the local best efforts clause. I think that's
8 focused more on the -- it would be -- the effect
9 would be indirect. It's more focused on the
10 development investment in the particular service
11 area. And if you invest -- if you're induced to
12 invest very heavily in the local service area, that
13 could reduce your interest or incentive to invest
14 otherwise, but it would be kind of an indirect
15 effect.

16 Q. By that, do I understand that you
17 believe that the local best efforts rules induce a
18 plan to invest heavily in its local service area?

19 A. Not necessarily. I think that's a
20 possibility but -- but it's not necessarily the
21 case.

22 Q. It's a possibility, and you haven't
23 analyzed whether, in fact, it is true?

24 A. By "it, "I take it you mean
25 whether -- what exactly the world would be like if

1 this, yes.

2 Q. Is it fair to say that you and
3 Professor Murphy have a disagreement about the
4 extent to which you find the procompetitive
5 justifications for ESA as compelling?

6 A. Yes.

7 Q. Best efforts, I believe, comes after
8 BlueCard, and it is on Page 31. Do you see
9 Section C, the "Best Efforts Rules Provide
10 Incentives for Plans to Invest in the Blue Brand
11 and System"?

12 A. I do see that.

13 Q. And you accept that investing in the
14 brand is a procompetitive benefit, a valid
15 procompetitive benefit in evaluating restraints?

16 MR. BROWN: Object to the form.

17 A. I agree -- I agree if one is doing a
18 rule of reason analysis, that from a theoretical
19 point of view one should consider best efforts --
20 I'm sorry, the investment that might be created by
21 best efforts. In other words, I agree with the
22 theoretical construct that seems to underlie what
23 Professor Murphy is doing here if one were doing a
24 rule of reason analysis. But it is a rule of
25 reason analysis, A. And B, it is a theoretical

1 construct.

2 Q. (BY MR. LAYTIN:) Evaluating
3 potential efficiency enhancing aspects of
4 challenged restraints is part of the brief
5 examination that is required to apply the per se
6 rule, right?

7 MR. BROWN: Object to the form.

8 MR. MARTIN: Objection.

9 A. No, I don't agree with the way you
10 stated it. I would just say in the abstract,
11 without necessarily characterizing Professor
12 Murphy's study, that simply pointing to theoretical
13 arguments about what might be a procompetitive
14 benefit would not for me be enough as an economist
15 for me to say that rule of reason should be
16 applied.

17 Q. (BY MR. LAYTIN:) I understand the
18 theoretical point versus proven point, established
19 through evidence point. I understand that
20 distinction.

21 But you agree with me that an
22 agreement that would otherwise be per se illegal,
23 of the type that would be per se illegal but that
24 also would achieve procompetitive benefits from an
25 efficiency enhancing integration with economic